

CONSUMER PRODUCT PROTECTION ACT OF 2001

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIME
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 2621

JULY 26, 2001

Serial No. 28

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://www.house.gov/judiciary>

U.S. GOVERNMENT PRINTING OFFICE

74-236 PS

WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: (202) 512-1800 Fax: (202) 512-2250
Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., WISCONSIN, *Chairman*

| | |
|-----------------------------------|------------------------------------|
| HENRY J. HYDE, Illinois | JOHN CONYERS, JR., Michigan |
| GEORGE W. GEKAS, Pennsylvania | BARNEY FRANK, Massachusetts |
| HOWARD COBLE, North Carolina | HOWARD L. BERMAN, California |
| LAMAR SMITH, Texas | RICK BOUCHER, Virginia |
| ELTON GALLEGLY, California | JERROLD NADLER, New York |
| BOB GOODLATTE, Virginia | ROBERT C. SCOTT, Virginia |
| STEVE CHABOT, Ohio | MELVIN L. WATT, North Carolina |
| BOB BARR, Georgia | ZOE LOFGREN, California |
| WILLIAM L. JENKINS, Tennessee | SHEILA JACKSON LEE, Texas |
| ASA HUTCHINSON, Arkansas | MAXINE WATERS, California |
| CHRIS CANNON, Utah | MARTIN T. MEEHAN, Massachusetts |
| LINDSEY O. GRAHAM, South Carolina | WILLIAM D. DELAHUNT, Massachusetts |
| SPENCER BACHUS, Alabama | ROBERT WEXLER, Florida |
| JOE SCARBOROUGH, Florida | TAMMY BALDWIN, Wisconsin |
| JOHN N. HOSTETTLER, Indiana | ANTHONY D. WEINER, New York |
| MARK GREEN, Wisconsin | ADAM B. SCHIFF, California |
| RIC KELLER, Florida | |
| DARRELL E. ISSA, California | |
| MELISSA A. HART, Pennsylvania | |
| JEFF FLAKE, Arizona | |

PHILIP G. KIKO, *Chief of Staff-General Counsel*
JULIAN EPSTEIN, *Minority Chief Counsel and Staff Director*

SUBCOMMITTEE ON CRIME

LAMAR SMITH, Texas, *Chairman*

| | |
|------------------------------|------------------------------------|
| MARK GREEN, Wisconsin | ROBERT C. SCOTT, Virginia |
| HOWARD COBLE, North Carolina | SHEILA JACKSON LEE, Texas |
| BOB GOODLATTE, Virginia | MARTIN T. MEEHAN, Massachusetts |
| STEVE CHABOT, Ohio | WILLIAM D. DELAHUNT, Massachusetts |
| BOB BARR, Georgia | ADAM B. SCHIFF, California |
| ASA HUTCHINSON, Arkansas, | |
| <i>Vice Chair</i> | |
| RIC KELLER, Florida | |

JAY APPERSON, *Chief Counsel*
SEAN McLAUGHLIN, *Counsel*
ELIZABETH SOKUL, *Counsel*
KATY CROOKS, *Counsel*
MICHELLE MCKINNEY, *Law Student*
BOBBY VASSAR, *Minority Counsel*

CONTENTS

JULY 26, 2001

OPENING STATEMENT

| | |
|---|---|
| The Honorable Lamar Smith, a Representative in Congress From the State of Texas, and Chairman, Subcommittee on Crime | 1 |
| The Honorable Robert C. Scott, a Representative in Congress From the State of Virginia, and Ranking Member, Subcommittee on Crime | 2 |

WITNESSES

| | |
|--|----|
| The Honorable Melissa Hart, A Representative in Congress From The State of Pennsylvania | |
| Oral Testimony | 4 |
| Prepared Statement | 6 |
| Mr. William Macleod, Partner, Collier Shannon Scott, Washington, DC, on Behalf of The Grocery Manufacturers of America | |
| Oral Testimony | 8 |
| Prepared Statement | 10 |
| Ms. Tracy Weaver, Leavenworth, WA | |
| Oral Testimony | 12 |
| Prepared Statement | 13 |
| Mr. David Zlotnick, Professor, Roger Williams University, Ralph R. Papitto School Of Law, Bristol, RI | |
| Oral Testimony | 15 |
| Prepared Statement | 17 |

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

| | |
|---|---|
| The Honorable Tammy Baldwin, A Representative in Congress From the State of Wisconsin | 2 |
|---|---|

APPENDIX

| | |
|---|----|
| Material submitted for the record | 27 |
|---|----|

CONSUMER PRODUCT PROTECTION ACT OF 2001

THURSDAY, JULY 26, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:05 p.m., in Room 2237, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Crime will come to order.

Today we have a legislative hearing and a markup on H.R. 2621, the Consumer Product Protection Act of 2001. I am going to recognize Members for opening statements. Then I will introduce the witnesses and we will look forward to their testimony. And I will recognize myself.

Today's hearing will focus on the need to protect consumers, particularly in grocery stores, from those who tamper with food containers. Under current law, such tampering is regrettably legal.

Product tampering can subject adults and children to violent, racist, or otherwise offensive materials placed between layers of packaging. Tampering transfers businesses' desirable products into vehicles for undesirable messages.

This hearing will focus on the necessity of legislation to deter those who would wrongfully insert these materials into product containers. Under current law, tampering with a product's packaging is not illegal, as long as it does not cause the labeling to be false or misleading or endanger the health or safety of consumers, yet product tampering can be harmful both to businesses and consumers.

There are two fundamental questions before us today: First, should businesses have legal recourse against those who interfere with the packaging and presentation of their products? And, second, should consumers have a right to control what they bring into their homes?

Parents can monitor their children's television shows, the music they listen to, the books they read, but they cannot anticipate offensive messages that may be in a cereal box. Just one company, for example, Kraft Foods, estimates that they have received nearly 100 complaints in the last 5 years, but that many more cases are not reported to them.

The manufacturers have concluded, after investigation, that many of these materials are placed in the packaging once the products have left their control. Often the products are tampered with

while in the retail stores, or bought, tampered with, and later returned.

While I believe that States and localities have the primary responsibility for law enforcement in our Nation, this activity directly affects interstate commerce, and protection of consumers and businesses in interstate commerce requires that action be taken by Congress.

I also want to thank our colleague and Member of the Judiciary Committee, Melissa Hart, for introducing this piece of legislation and for her long time commitment to consumer issues. And Melissa, we will look forward to hearing your comments in just a minute, but we appreciate your sponsoring this bill along with Tammy Baldwin, another Member of the Judiciary Committee.

The gentleman from Virginia, Mr. Scott, is recognized for his opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. And speaking of the gentlelady from Wisconsin, I would ask unanimous consent that a statement from her be introduced into the record.

Mr. SMITH. Without objection, so ordered.

[The prepared statement of Ms. Baldwin follows:]

PREPARED STATEMENT OF OF THE HONORABLE TAMMY BALDWIN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. Chairman,

I am pleased to be the lead Democrat on H.R. 2621, the Consumer Product Protection Act of 2001. I thank Representative Melissa Hart for introducing the bill, and for her work on this issue. It is my strong hope that the Subcommittee will report this bill favorably to the full Judiciary Committee.

Over the last several years, consumers have been finding offensive materials attached to, or inserted inside the packaging of a variety of products. Most of these inserts are material that is offensive in nature. Finding offensive material can be shocking. It is especially objectionable when a child opens a box and finds offensive, and even pornographic, material inside.

This bill would amend the Federal Anti-Tampering Act by making it a crime for a person to place any writing, either on the outside of the package or on the inside, prior to its sale to a consumer. There are exceptions in the bill for promotional and sales purposes, if approved by the manufacturer, distributor, or retailer.

Consumer product companies have approached federal law enforcement authorities to request that they investigate and prosecute this type of product tampering. However, both the FBI and the FDA's Office of Criminal Investigations do not believe they have authority to prosecute these crimes. The Consumer Product Protection Act would address this gap in federal law, and give authorities the tools they need to investigate and prosecute these acts. I am pleased to be an original cosponsor of this bill, and I strongly urge the Subcommittee on Crime to report the bill favorably to the full Judiciary Committee.

Thank you, Mr. Chairman.

Mr. SCOTT. I am pleased to join you in convening the hearing on H.R. 2621, the Consumer Product Protection Act of 2001, and welcome the gentlelady from Pennsylvania, Ms. Hart, our colleague from the Judiciary Committee and chief patron of the legislation.

This legislation addresses the problem of writings and materials being placed in or on the packaging of consumer products, reports of detailed insulting, insensitive, and downright grotesque material being placed in or on the packaging of products, including racial and ethnic slurs, and we have some that have been shown to us, that I will just ask you to take my word for it. We won't introduce them for the record. Many times such materials have been discovered by young children, and understandably neither consumers nor

the manufacturers and retailers wish to encounter such materials in connection with their products.

This activity is not illegal under Federal law and may not be illegal under State law. Ordinarily we would prefer that the States develop any necessary criminal law provisions for activities occurring within their borders. However, the nature of the problem, where placing writings in or on products in one State could end up in a number of other States, and to the extent that any criminal provision would be needed, it is appropriate that we consider Federal action.

I am concerned, however, that the provision of the bill calling for fines of up to \$250,000 and imprisonment up to 3 years may be too harsh for the activity about which we are concerned today, the distribution of insulting or insensitive materials on products before their purchase. Therefore, I will be offering amendments which would temper the level of harshness and restrictiveness in the bill, maintaining, however, the criminality and making sure that that activity is in fact illegal.

I want to hear testimony and advice from our witnesses on this issue, and believe that with their guidance and assistance we can reach consensus on a bill which will adequately address the problem without the risk of excessive punitive assessments.

Thank you, Mr. Chairman, and I look forward to our witnesses. Mr. SMITH. Thank you, Mr. Scott.

Are there any other Members who wish to make an opening statement? The gentleman from North Carolina, Mr. Coble, is recognized.

Mr. COBLE. Mr. Chairman, very briefly, I have no formal statement, I want to commend you and Mr. Scott for having staged this hearing, and commend our friends from Pennsylvania and Wisconsin for being the lead promoters.

And Melissa, I am by no means trying to rain on you parade. I am just sort of extending, Mr. Chairman, what Bobby said. I am thinking aloud now.

I am wondering if these violations could be better addressed at the State level, that is to say, whether or not we need Federal legislation. And maybe we do. I suspect Melissa will tell us that we do, and if we do, that suits me fine. But oftentimes, Mr. Chairman, as you know, we will come into the Federal courts when there are adequate State remedies available, and that may or may not be the case here.

But in any event, Mr. Chairman, I am happy that you saw fit to stage this hearing, and I appreciate your recognizing me.

Mr. SMITH. Thank you, Mr. Coble.

Any other opening statements? If not, I will introduce the witnesses. They are the Honorable Melissa Hart, U.S. House of Representatives, Pennsylvania's Fourth District; Mr. William MacLeod, partner, Collier Shannon Scott, from Washington, D.C., testifying on behalf of the Grocery Manufacturers of America; Tracey Weaver, a victim of the type of offense we are trying to address today, from Leavenworth, Washington; and Professor David Zlotnick, Roger Williams University, Ralph R. Papitto School of Law, in Bristol, Rhode Island.

We welcome you all, and we look forward to hearing first from our colleague, Ms. Hart.

STATEMENT OF THE HONORABLE MELISSA HART, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Ms. HART. Thank you, Mr. Chairman. It is an honor to be able to testify before this Committee, and I am pleased for the cooperation of the gentleman and the Ranking Member in helping to bring this before the Committee today.

First let me tell you that protecting consumers is an issue that has driven me, really, through my legislative careers, and I have only been here for about 6 and a half months. I did serve in the Pennsylvania State Senate for 10 years, and worked on consumer issues there.

So when Chairman Smith first approached me about working on this issue, I was very interested, but I did have the same impression that a lot of people might have had and Mr. Coble mentioned: Is this the kind of incident that requires Federal action, Federal legislative action? But after researching and discussing the issue further, I do believe that it does.

I learned that individuals who tamper with often grocery products by including various propaganda or salacious materials cannot be prosecuted under Federal law, but others who tamper with such products can. It depends upon the result of the tampering. And I think what we are doing here is actually closing a loophole in the law.

This is a problem that consumers, especially children, should not be faced with. There is a simple solution in closing this loophole, and the legislation that Congresswoman Baldwin from Wisconsin and I have introduced does criminalize this tampering like other tampering is already criminalized.

Imagine purchasing a box of your favorite cereal, or worse still, purchasing box of your favorite cereal and giving it to your child in the morning. The child opens the box and finds the salacious materials. At first this scenario sort of seems surreal. The last thing you would expect, on opening the box of Applejacks, is to have something come out that is extremely offensive and just has no place there.

But in fact it happens, and unfortunately—maybe not to Applejacks, that was just my example—but unfortunately it has not been something that can be prosecuted. And industry officials have reported over the past few years that they have received over 100 complaints of such a thing happening. This obviously doesn't factor in cases that have happened that have not been reported.

This type of behavior is inappropriate, for a whole host of reasons. Most importantly, it does harm consumers. It may not physically harm them, like tampering with Tylenol that may have caused a death. You know, that certainly is a much more serious offense. But it is an offense.

As a State Senator, before I joined Congress, I had introduced an amendment, actually a bill that was signed by the Governor, that protects individuals, especially children, from pornographic e-mails that were unsolicited. I believe this bill establishes a similar type

of protection, and in fact, similar legislation is now moving through the Congress. Because, again, it is unsolicited. It may not cause physical harm to you, but it does cause some grief and some concern, especially when the targets of these messages are children.

I believe that what we do by regulating this is attack the manner in which those messages are delivered. I think most people agree that we don't want to get involved in the free speech issue, but this isn't that. This is taking a product that a customer has a right to expect a certain thing when they open the box, what is in there, the cereal, but not to be offended with remarks or with pornographic materials or with something else that certainly does not belong there and has not been sanctioned by the manufacturer.

It is an extraordinary information age, an age where various interests are constantly bombarding each of us with information. In an attempt to grab our attention, these groups are constantly looking for new ways to spread their message. While we are often annoyed with the pop-up ads on our favorite web sites, that kind of advocacy is legitimate. Those are ads that are purchased and are legitimately there.

Unfortunately, some of the messages that we are introduced to are unwanted and unwarranted, and I believe illegal, should be illegal, invasions into our private lives. All too often, the groups or organizations that use these techniques have quite a subversive message, and they really don't have another way to spread their message. People aren't willing to accept their message.

So consumers, especially children, who are very impressionable, should not be subjected to this shocking material delivered in such an unexpected manner. Beyond the pure shock value of these actions, this type of behavior, no matter what the contents of the material, is a problem that I believe needs to be addressed.

Placing these items in products without the authorization of the manufacturers or the packagers raises several issues. First, it assuredly raises legitimate questions about the safety of these products in the eyes of the unsuspecting consumer who opens that package that has been tampered with. Also, it is an unacceptable method for dissemination of any sort of message. The law should not allow anyone to freeload on the reputation, manufacturing, or advertising of another.

Finally, the problem dissolves the trust that is created between the consumer and the brand name that they believe and have trusted to deliver a quality product. This is not only an issue for the consumers who rely on the safety of these products, but also the companies who stake their good reputations on the products that they deliver. Many of these incidents have been reported to these companies, and the companies have attempted to answer the customers' complaints, much to their credit.

Unfortunately, again, this action runs into a roadblock. Federal officials responsible for enforcing consumer protection laws noted that they don't have the authority to redress this problem. That is why I believe this legislation is important.

In 1994 Congress passed the Federal Anti-Tampering act to protect consumers from dangerous violations of the products that they purchase. It was sparked by a number of reported instances of tampering with the contents of a package, or deceptive labeling of prod-

ucts that was not put there by the manufacturer nor authorized, that raised safety concerns among consumers.

But that legislation left a gap. It does not cover the kind of tampering that I have been discussing today. It only addresses tampering that harms the physical safety of a customer. I believe the tampering involved in these cases is also harmful to consumers and deserves to be addressed.

My legislation would fill the gap by protecting consumers from tampering. While not directly endangering their health, it raises serious concerns about the safety of the products that they have purchased. It is also a violation of the manufacturers' sort of confidence with the consumer.

The Consumer Product Protection act is good legislation. It protects consumers from receiving unwanted material. The legislation also gives consumers the reassurance that the Federal Government protects the safety of the products that they purchase.

In addition, we often ask corporations to weigh the concerns of individuals who purchase their products. In this case the corporations who produce these products have tried to address the concerns of their consumers, but they have no means to adequately address it. There is no legal means to do so.

This legislation would close that gap in Federal law and give them the opportunity to give the consumers the protections that I think we all believe they deserve. I ask the Members of the Subcommittee to stand up for protecting consumers and support the legislation.

I want to thank my cosponsor, Tammy Baldwin, and I want to thank the Chairman and the Members of the Subcommittee for giving me the opportunity to testify, and I look forward to working with the Judiciary Committee in the future on the legislation.

[The prepared statement of Ms. Hart follows:]

PREPARED STATEMENT OF OF THE HONORABLE MELISSA A. HART, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, Ranking Member Scott, Members of the Subcommittee.

First, let me express my appreciation to the subcommittee for giving me the opportunity to testify regarding this important issue. Protecting consumers is an issue that I had the opportunity to work on as a state senator in Pennsylvania and I am pleased to continue working for consumers here in Congress.

When Rep. Smith first approached me about working on this issue, I probably had the same impression that many of you have—does this kind of incident occur enough to warrant legislative action? After researching and discussing the issue further, I learned that individuals tampering with grocery products by including various means of propaganda are in fact a problem. This is a problem that consumers, especially children, should not be faced with and there is a simple solution. The legislation that Congresswoman Tammy Baldwin and I introduced criminalizes such tampering with these products.

Imagine purchasing a box of your favorite cereal, opening the box, and finding salacious materials. At first this scenario seems almost surreal, but this is in fact happening and the number of reported incidents continue to increase. Industry officials report that over the past few years they have received over 100 such complaints. This obviously does not factor all of the unreported cases.

This type of behavior is inappropriate for a whole host of reasons. Most importantly, this type of behavior harms consumers. As a state Senator and a member of this committee I introduced an amendment to protect individuals, especially children, from unsolicited pornographic e-mails. I believe that this bill establishes similar protections, not by regulating the content of the message, but by regulating the questionable manner in which the message is delivered.

We live in an extraordinary information age, where various interests are constantly bombarding each of us with information. In an attempt to grab our attention, these groups are constantly looking for new ways to spread their message. While we are often annoyed with pop-up ads on our favorite web sites, such advocacy is legitimate. Unfortunately, some of the advertising that we are introduced to is an unwanted invasion into our private lives. All too often, the groups and organizations that use such techniques have a subversive message, and this is the best way they can spread their message. Consumers, especially children, should not be subject to shocking material delivered in such an unexpected manner.

Beyond the pure shock value of such actions, this type of behavior, *no matter what the contents of the material*, is a serious problem that we need to address. Placing these items in products without the authorization of the producer raises a few issues. First, it assuredly raises legitimate questions about the safety of these products in the eyes of the unsuspecting consumer who opens the package that has been tampered with. Also, it is an unacceptable method for the dissemination of any sort of message; the law should not allow anyone to freeload on the reputation, manufacturing, and advertising of another.

Finally, this problem dissolves the trust that is created between a consumer and a brand name that they believe they can trust to deliver a quality product. This is not only an issue for the consumers who rely on the safety of the products they purchase, but also the companies who stake their reputation and good name on the products they deliver.

Many of these incidents have been reported to the companies that make the product and to the corporation's credit; they have attempted to answer their customer's complaints. Unfortunately, such action has run into a roadblock. The federal officials responsible for enforcing consumer protection laws have noted that they do not have the authority to redress these problems.

That is why this legislation is important. In 1994, Congress passed the Federal Anti-Tampering Act to protect consumers from dangerous violations of the products they purchase. A gap in that legislation does not cover the kind of tampering that we are discussing today and only addresses tampering that harms the safety of the consumer. I believe that the tampering involved in these cases is also harmful to consumers and deserves to be addressed in our laws. This legislation would fill that gap by protecting consumers from tampering that while not directly endangering their health raises serious concerns about the safety of the products they have purchased.

The Consumer Product Protection Act is good legislation. It protects consumers from receiving unwanted material. The legislation also gives consumers the reassurance that the federal government protects the safety of the products they purchase. In addition, we often ask corporations to weigh the concerns of the individuals who purchase their products. In this case, the corporations who produce these products have tried to address the concerns of their customers, but they do not have the legal means to adequately address their consumer's complaints. This legislation closes the gap in federal law and provides consumers and businesses with the protection they deserve.

I ask the members of the subcommittee to stand-up for protecting consumers and support this legislation.

Again, I want to thank the Chairman and members of the subcommittee for giving me the opportunity to testify and for considering this legislation. I look forward to continue working with my Judiciary Committee colleagues on this and future legislation.

Mr. SMITH. Thank you, Representative Hart. And I understand, are you going to need to leave, or are you going to—

Ms. HART. I am going to need to leave, if that is all right with the Chairman.

Mr. SMITH. No problem at all. I just was going to explain that you had a conflict and weren't going to be able to stay, but in your absence, we will proceed. But thank you again for your testimony.

Ms. HART. Okay. I understand that there may be an amendment, also, to the bill that will be offered.

Mr. SMITH. Mr. Scott has two amendments, and I understand you have seen them and support them.

Ms. HART. Yes. Are they now two amendments, or are they one?

Mr. SCOTT. Well, they will be offered en bloc.

Ms. HART. Okay. I understand that the amendments deal with penalty, and I believe that his attempt to bring the penalties more in line with the current law is reasonable, and I would accept that. I would only ask that we make sure that we follow it down the road and keep open minds as to whether or not this has actually made a difference in how often this kind of thing occurs, and keep our minds open as to maybe if we need to increase the penalty in the future.

The other issue—

Mr. SCOTT. It says that this section shall not apply in any cases in which a manufacturer, retailer or distributor of the product, in the due course of business, consents to the stamping, printing, placing or inserting of a writing for promotional or sales purposes. My amendment would strike “for promotional or sales purposes” if the distributor has consented to it.

Ms. HART. Right. I like that amendment. I thank the gentleman for that.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you again, Representative Hart. Appreciate your being here.

We will go to our next witness, Mr. MacLeod. And let me say to the remaining witnesses, we expect a vote as soon as the next 15 or 20 minutes, so it will be helpful if you do keep your testimony to the 5-minute limit or even less, and we will try to get through our hearing.

Mr. MacLeod, we will go to you next.

STATEMENT OF WILLIAM MacLEOD, PARTNER, COLLIER SHANNON SCOTT, WASHINGTON, DC, ON BEHALF OF THE GROCERY MANUFACTURERS OF AMERICA

Mr. MACLEOD. Thank you very much, Mr. Chairman. My name is William MacLeod, and I am a partner in the Washington law firm of Collier Shannon Scott, and I am here today on behalf of the Grocery Manufacturers of America. Before entering private practice, I was a Federal Trade Commission official for 8 years, including for the last 4 years as the Bureau of Consumer Protection director.

At the outset, I would like to thank the Committee for extending its invitation for me to testify on behalf of the Consumer Product Protection act of 2001. The Grocery Manufacturers of America is the world’s largest association of food, beverage, and consumer product companies, with more than \$460 billion worth of revenues and member companies employing over 2.5 million workers nationwide.

GMA is very concerned about the offensive messages that we have found in our own products, or rather consumers have found in our own products, and we support this legislation to address what we consider to be a crack, a gap in the Federal Anti-Tampering act. We believe the Anti-Tampering act has worked very well to protect consumers from tampering of products that have visited danger upon consumers and possible injury to businesses, but we have discovered in the course of the enforcement of that act that it is not effective against some of the most offensive inserts

and some of the most offensive tampering of products that might possibly occur.

Over the last several years, a number of grocery manufacturer member companies have encountered examples and reported to us, and let me just give you a few examples of the sorts of inserts that we are dealing with here. And even in this hearing I must water these down tremendously from the actual graphic and offensive nature that we have observed in our packages.

Inside one package, a piece of paper pictured an immigrant being gunned down with a machine gun. Other messages have promoted Nazi themes. Some have simply advocated genocide against various racial, ethnic, or religious groups.

Some consumers have discovered labels or advertisements for other products or other services inserted inside the packages of manufacturers' products. And some have indicated warnings or other scare tactics that are obviously designed to frighten consumers away from the products that the manufacturers are offering.

For example, one sticker affixed to a food product warned that the product could pose serious health and environmental risks. Another one suggested that a product was the source of human beings, byproducts of human beings. A consumer found a solicitation for a free TV service underneath the lid of a coffee can that the consumer brought home and opened up.

It is a very easy thing to do, and I will allow your other witnesses to describe this, but think of the communication and think of the relationship between a manufacturer and a customer, when Sugar Bear is presenting Golden Crisp to the children of the United States. It is not very hard at all for me, who wants to tamper with this package, to put inside a message and get it in so deeply that there is no way to know until you bring the product home and you open it up.

And it looks like it could be any of the kinds of messages that consumers find inside the package or outside the package, and not until the consumer has read a racist or a hate message, or perhaps a promotion for a pornographic product, that this doesn't seem quite right. Is this manufacturer, the Sugar Bear, actually trying to purvey this kind of information to me?

That causes, at the very least, discomfort, sometimes trauma, sometimes serious emotional harm to the consumer, and needless to say, injury to the business of the manufacturer of the product. The current Anti-Tampering act simply does not address these kinds of problems.

We believe that the proposed legislation does indeed close this loophole, does it in a very effective manner, and it would give the Federal Government the authority to police just these types of injuries visited upon consumers and upon the manufacturers, and do it in a way that will attract the needed Federal attention to it.

We are concerned with the possible watering-down of penalties under the act because, as a former prosecutor myself, I can tell you that when prosecutions begin to reach the bottom levels of violations that an agency pursues, those prosecutions get less attention. We think the penalties ought to be certain, we think the penalties ought to be severe for this kind of conduct.

We think that this is a problem that is more likely to grow over time. It is not going to go away, and we think that legislation like this is just the means to address it. So we endorse heartily the efforts. We thank the Committee. Thank you, Mr. Chairman. I will be available for any questions you might have.

[The prepared statement of Mr. MacLeod follows:]

PREPARED STATEMENT OF WILLIAM C. MACLEOD

Mr. Chairman, distinguished Members of the Committee:

My name is William MacLeod, and I am a senior partner at the law firm of Collier Shannon Scott, PLLC in Washington, DC. I am speaking to you on behalf of the Grocery Manufacturers of America (the "GMA"). I have represented GMA, as well as a number of GMA member companies, for approximately nine years. Prior to entering private practice, I spent eight years working at the Federal Trade Commission, including four years as the Director of the Bureau of Consumer Protection. At the outset, let me thank the Committee for extending its invitation to testify regarding the importance of the proposed Consumer Product Protection Act of 2001.

The GMA is the world's largest association of food, beverage and consumer product companies. With sales of more than \$460 billion in the United States, GMA member companies currently employ more than 2.5 million workers across each of the fifty states. The GMA represents food and consumer product manufacturers at the state, federal and international levels on a variety legislative and regulatory issues. As a representative of these manufacturers, the GMA is very concerned about the recent outbreak of offensive messages that have been found in packages of consumer products across the country.

OVERVIEW OF THE FEDERAL ANTI-TAMPERING ACT

As you know, Congress passed the Federal Anti-Tampering Act¹ (the "Act") in 1994 to protect consumers from the dangers of using products whose contents or labels had been tampered with. Congress sought not only to guard against the physical health risks that could result from such tampering, but also to prevent the adverse impact that the tampering would have on consumer confidence.

The Act generally makes it unlawful for individuals to tamper with consumer products, their packages or labels with reckless disregard of the dangers that could befall another person. In addition, the Act provides for criminal penalties for individuals who tamper with these products, packages or labels with the intent to injure a business. The Act states, in pertinent part:

Whoever, with intent to cause serious injury to the business of any person, taints any consumer product or renders materially false or misleading the labeling of, or container for, a consumer product, if such consumer product affects interstate or foreign commerce, shall be fined under this title or imprisoned not more than three years, or both.²

Although the Act has been effective in addressing certain instances where consumer products themselves have been tampered with, there continues to be a nation-wide problem with tampering of packages and labels that has fallen through the cracks in text of the Act. It is these cracks that the Consumer Product Protection Act of 2001 aims to fill.

OFFENSIVE AND MISLEADING MATERIALS HAVE BEEN INSERTED IN PACKAGES

Over the last several years, a number of companies have reported consumer complaints regarding offensive materials that consumers have found attached to, or inserted in, the packages of various consumer products, such as cereals and frozen foods. Subsequent investigations have indicated that in all likelihood these materials were added to the packages while the products were on the store shelves. In most cases, papers are inserted between the spaces of the cardboard flaps in a package in such a manner that a buyer cannot see them until he opens the product at home.

The materials that have been found inside these boxes are oftentimes patently offensive. Many of these materials include messages of hate and encourage violence against members of ethnic, religious or cultural groups. The materials frequently contain language or images that would be shocking to many adults, and trauma-

¹ 18 U.S.C. § 1365 (2001).

² *Id.* § 1365(b).

tizing to most children. I would hesitate to repeat much of the language found in these materials or to show such pictures in this chamber. Allow me to give you some examples, however, so that you can better grasp the scope of the problem.

- A paper was recently found in the package of a consumer product that pictured an immigrant being shot with a machine gun. A telephone number is provided.
- Other messages promoted Nazi causes.
- Numerous inserts advocated genocide.

In addition to these shocking messages, some consumers have discovered labels attached to packages or advertisements for other products that were inserted into the packages by third parties. Because the text of the labels and advertisements were either related to the product inside the package itself, or otherwise made reference to another consumer product, a number of consumers have mistakenly believed that these messages were supplied by the manufacturer. Again, allow me to provide you with just two examples.

- A sticker affixed to a snack food product warned that the product could pose serious health and environmental risks.
- A consumer found a solicitation for a “free” TV system under the lid of a food container. After finding the solicitation had no relationship to the manufacturer, the consumer threw the product away.

Individuals who find false warning labels on products that are purportedly from the manufacturer are likely to have misgivings about purchasing these products or else have concerns about their health afterwards. And individuals who find advertisements or rebates inside a package are likely to think that the advertised products are backed by the manufacturer’s good name. These misrepresentations will have an adverse effect on the relationship between manufacturers and consumers.

TAMPERING HURTS CONSUMERS, MANUFACTURERS AND STORES

As a consequence of such incidents of tampering, what has always been a critically important relationship between manufacturers of consumer products and their customers has been invaded in an insidious way. It’s not difficult to see how these incidents can cause significant harm to consumers, manufacturers and stores alike.

Consider, for example, a young child who wakes up in the morning and runs downstairs to have her breakfast. She opens a box of cereal and immediately finds a piece of paper that contains hateful language and graphic images. Most children would be disturbed or even traumatized by such messages. Needless to say, most parents would be troubled as well. Parents work hard and go to great lengths to protect their children from ideas they consider harmful. The fact that such ideas are being surreptitiously inserted into the products their children use makes the parents’ job that much harder.

Consider also what would happen to the parents’ confidence in the manufacturer of the product in which the message was found, or in the grocery store in which the product was purchased. Parents would likely lose trust in both the manufacturer and store and be wary about purchasing from them again. For companies who interact with consumers on a daily basis, nothing is more important than developing a consumer’s trust in their products or services. Finding an offensive message in the packaging of a product can instantly tear down the trust that these companies have taken years to build.

THE CURRENT ACT IS NOT EFFECTIVE

The current Federal Anti-Tampering Act is not effective to prevent the harm that has come to consumers, manufacturers and sellers of consumer goods as a result of individuals tampering with product packages and labels.

Section 1365(b) of the Act requires that a person have “the intent to cause serious injury to the business of any person” in order to be convicted. Intent to cause harm to one particular business would be difficult for a federal prosecutor to prove, especially in cases where messages are placed in the products of several manufacturers and in several grocery stores. Moreover, the Act does not cover the unfortunate situations in which an individual who tampers with a product intends to traumatize or cause other non-physical harm to consumers.

The Act also requires that the messages added to the packaging render the labeling false or misleading in order for a person to be convicted. This requirement could thwart law enforcement against some of the worst messages I just described.

These two requirements in section 1356(b) give the Act a very narrow scope and, as a result, many instances of product tampering have fallen through the cracks. To more effectively protect consumers against product tampering, we need to amend the Act to cover such instances.

THE CONSUMER PRODUCT PROTECTION ACT OF 2001 WOULD BENEFIT CONSUMERS AND
MANUFACTURERS

The Consumer Product Protection Act of 2001 would fill in the cracks of the present Act by inserting the following subsection:

Whoever knowingly stamps, prints, places, or inserts any writing in or on any consumer product, or the box, package, or other container of any consumer product, prior to its sale to any consumer, shall be fined under this title or imprisoned not more than three years, or both.

This subsection would not apply to cases where the manufacturer, distributor or retailer of a product consents to the addition of the writing.

This new language would provide the Federal government with the authority it needs to more effectively protect consumers against individuals who insert hateful, offensive or misleading messages or pictures into the packages of consumer products. Without such protection, it is possible that the recent outbreak of offensive materials that have been found in packages of consumer products across the country could be the first pebbles in an avalanche of confusing, misleading and traumatizing invasions of privacy of both consumers and manufacturers.

The Consumer Product Protection Act of 2001 could help us stem this avalanche in a manner that is narrowly tailored to address the sort of harm we have been seeing in the past few years. For this reason, I urge you on behalf of the GMA to vote in favor of the bill.

Thank you once again for the opportunity to speak to you this afternoon. I look forward to your questions.

Mr. SMITH. Thank you, Mr. MacLeod.
Ms. Weaver.

STATEMENT OF TRACEY WEAVER, LEAVENWORTH, WA

Ms. WEAVER. Thank you. I would just like to—

Mr. SMITH. Have you ever testified before?

Ms. WEAVER. No.

Mr. SMITH. That is not asked to make you nervous, it is to put you—you don't need to worry. You ought to feel totally at ease.

Ms. WEAVER. I would just like to explain the situation that occurred in our household. We were victims of this material.

On New Year's Eve, 2000, my family was preparing to go celebrate the incoming year with my elderly grandparents and their next door neighbor. We were in charge of bringing the dessert, and my son and I were sitting at our table working on a home schooling project, and my husband volunteered to help with the kitchen duties.

When he opened the box of cheesecake is when our whole fiasco began. Inside the box, along with the ingredients, was a slip of paper with the words "Free Trip to Africa." My husband, who wasn't paying very close attention to the paper, more busy preparing the dessert, dropped it on the table and said, "Look, we've won a free trip."

Unfortunately, my son was excited with the aspect of a free trip, and it wasn't until I started reading the coupon that I realized it was not a prize but unsolicited racial hate material. I became upset, asking my husband where this item came from, and he said it was inside the box of cheesecake. My son became upset because he didn't understand what the whole situation was about.

It pretty much ruined our plans for our holiday, and we ended up explaining what racism and hate crimes actually were. We come from a very small town in Washington State where we don't experience this type of thing on a daily basis. We had to explain that it wasn't directed at us personally, it was just a random act of stupidity.

This incident not only affected our immediate household, but there were guests at our dinner and we had to explain why there was no dessert, and we all agreed that we shouldn't eat the cheesecake in case the ingredients had been tampered with. We were not aware of how such a situation could happen.

The next step we took was calling Kraft Foods' consumer number that was printed on the box. The lady that I spoke with on the telephone explained that it was a common occurrence and there had been many cases reported in the New Jersey area. She took my information and told me that someone from a courier service would come to pick up the box as well as the unsolicited materials. She also suggested that I contact our local law enforcement agency, which I did.

My husband is employed by a large retail grocery chain, and I suggested that he explain to his manager, report the incident to him, what had happened. To our knowledge there were no similar incidents reported to his store.

The law enforcement agency, our local sheriff's department, contacted my husband at work, and they took a report. However, they did tell him there was nothing they could do to help us. There was no way for them to tell where the material had originated from.

I was totally appalled at the lack of interest, and I assumed that this sort of activity was illegal. It was not until this past week that I have discovered that this is not a crime in Washington State. And although this incident was more than 6 months ago, it is still a very fresh and painful one, one that I pray another family does not have to go through. I believe if the legislation is passed making this a crime punishable by law, it could hopefully save another family from this experience.

[The prepared statement of Ms. Weaver follows:]

PREPARED STATEMENT OF TRACEY WEAVER

On New Year's Eve, 2000 my family was preparing to celebrate the incoming year with my elderly grandparents and their neighbor. We (my husband son and I) were in charge of bringing the dessert. My son and I were working on a home-schooling project and my husband volunteered to help with the kitchen duties.

My husband opened a box of Jell-O Cheesecake when this whole fiasco began. Inside the box, along with the ingredients was a slip of paper with the words, "Free Trip To Africa". My husband, who wasn't paying very close attention to the paper, deposited it before my son and I said, "Look we've won a free trip." Unfortunately, my 10-year-old son became excited over winning such a fantastic prize. It wasn't until we started reading the "coupon" that I realized that it was not a "prize" but unsolicited racial hate material. I became quite upset and asked my husband where it had come from; he told me that it was in the cheesecake box. My son, who is biracial, became upset because he didn't understand why anyone would do this kind of thing. This whole incident pretty much ruined our plans for the holiday. We had to explain to our son about racism and hate crimes, we are from "small town America" where this is not an everyday occurrence.

We also had to explain that this was not directed at us personally it was just a random act of stupidity. This incident not only affected our immediate household, but also the guests at our dinner, as I had to explain why there was "no dessert".

We all agreed that we shouldn't eat the cheesecake in case the ingredients had been tampered with.

The next step we took was calling Kraft Foods consumer number that was printed on the box. The lady that I spoke with on the telephone explained that it was a common occurrence and there had been many cases reported in the New Jersey area. She took my information and told me someone from a courier service would come to my home and pick up the box as well as the unsolicited materials. She also suggested that I call my local law enforcement agency, which I did.

My husband is employed by a large, national grocery chain, the very one where I purchased the cheesecake package, and I suggested he report the incident to his manager. Their main concern was that the incident be kept quiet and to not associate Safeway in any way. His manager was unhappy that I had called Kraft Foods and our local sheriff's office. To my husband's knowledge there were no similar incidents reported to our local Safeway store.

The Sheriff's deputy contacted my husband at work and took a report and told him that there was really nothing they could do to help us. There was no way for them to tell where the material originated from. I was totally appalled by their lack of interest as I assumed that this sort of activity was illegal, it was not until this past week that I became aware this is not a crime in Washington state.

Although this incident was more than 6 months ago, it is still a very fresh, painful memory, one that I pray another family does not have to go through. I believe that if this legislation is passed making this a crime punishable by law, it could hopefully save another family from this same experience.

Thank you for your time.

Exhibit 1

"Coupon" found in Mrs. Weaver's Cheesecake Box

Nº 1982

Drop this stub in slot when entering elevator. These nigger coupons are hand-copied. Head the the elevator last on the way to the mission. Drop leg and foot sticks, stir up go where number is drawn. Big prize \$1000.00. Otherwise, \$500 each, cash.

Keep This Stub



Coon-ard Lines

Boat Ticket to Africa

This ticket entitles One Nigger to:

- Free trip to Africa on a Luxury Liner with plenty of pumps. Boat is shaped like a Cadillac with fins!
- All the bananas and choice cuts of missionary desired. NAACP members may sit up front.
- Barrel of azel-grass for hair. Delicately scented with nigger-sweat. Free jar of meat tenderizer.
- Framed picture of Eleanor Roosevelt and Harry Golden. Twist to Martin Luther King's Jazz band.
- Chicken-coup and watermelon patch on deck. Left unguarded at night. Plus Fish 'n Chips for breakfast!
- Plenty of wine, marijuana, heroin and other refreshments.

Nº 1982
(ONE-WAY ONLY)



Mr. SMITH. Thank you, Ms. Weaver. That was very informative testimony, and as you know, we are relying on the testimony of you and others like you to move forward. Appreciate your being here. Professor Zlotnick.

STATEMENT OF DAVID ZLOTNICK, PROFESSOR, ROGER WILLIAMS UNIVERSITY, RALPH R. PAPITTO SCHOOL OF LAW, BRISTOL, RI

Mr. ZLOTNICK. Thank you, Mr. Chairman, Members of the Committee. Thank you for the opportunity to be here and to address my remarks about this bill.

I would like to start with three basic concerns I have with the bill. I think I will begin with the issue raised by Congressman Coble, and that is the issue of the federalization of crime.

Across the political spectrum, there is great concern about the piecemeal federalization of crime in America. Federal prosecution accounts for only 5 percent of all prosecutions, and we need to think long and hard in devoting the limited Federal resources and recognizing the limited impact that Federal prosecution can have on particular issues.

I think we need to ask ourselves several questions before we create yet another small Federal criminal offense, the first being the issue also raised by Congresswoman Hart and also Congressman Scott. The question is, is there already adequate State remedy for this problem?

I think the answer to that is largely yes. Traditional criminal law, State criminal law, punishes the destruction or defacing or altering of private property. These are generally petty misdemeanors that can be prosecuted in most jurisdictions. It is as if someone went into the grocery store, ripped off a piece of the box and threw it on the ground. It is a crime, and if brought to the attention of the local police and prosecutors, and those authorities think that this is an important issue, it can be prosecuted.

The second question is, if State laws are not adequate. Is there new legislation that the States have undertaken which will address the issue, making it unnecessary for the Federal Government to act?

I think the sponsors themselves have cited both California and New Jersey have passed legislation already that covers this issue. Now, whether or not this is becoming a problem so great in national scope, the best Mr. MacLeod can offer us is that it could be the first pebbles in an avalanche. I am not sure, given the increase in Federal crime, that that is really enough to move this Committee. I think we need to wait and see whether the States can or cannot address this problem sufficiently.

The Supreme Court also allows the States to increase the penalty for crimes based on motive or bias, if those crimes already exist. Thus, States could take their existing laws that prohibit the destruction of property and increase the penalties, if they so choose, if the crime is motivated by hate or bias.

The second question I think we need to ask ourselves is, is this legislation part of a comprehensive plan to address an area, or is it sort of a reaction to a few incidents, albeit they are offensive or frightening to individuals?

I am just not convinced that there is a countrywide epidemic, and I don't think this Committee has been presented with evidence that suggests that that is so. I think then we are really not dealing with a comprehensive look at what the role of the Federal Govern-

ment should be in consumer product tampering, but really just a piecemeal addition.

And I beg to differ with Congresswoman Hart that this is not closing a loophole. The original Federal consumer protection tampering act addressed a very serious concern of poisoning people by the addition or alteration of consumer products, something that the Federal Government probably has a reason to be involved with, given the enormous resources of the FBI and the grave threat to public health. This piecemeal addition, which punishes speech, not threats to public safety, not threats to public health, is just another piece being added in this layering that we see all across the criminal code.

Third, I think we need to ask, is this counterproductive? And I think the answer to this is yes. Everything that I have read and seen suggests that the best way to address hate groups and hate speech is at the local level. Community leaders, business people, elected officials, religious leaders, through community organizing, through public forums, even through civil suits suing the individuals who have done this and taking their property, that is what seems to be the most effective.

These groups, Members of the Committee, see you, the Federal Government, as their enemy, and creating a Federal crime simply feeds their sympathizers and their paranoia that the Federal Government is out to get them. Let's let the States continue to work on this.

The second objection that I have, and again I will just briefly note this, as it is gone into in some detail in my written testimony, is in an effort to avoid a First amendment problem or a First amendment challenge, the drafters of this bill have created a statute that is simply too broad and sets forth a penalty that is inconsistent, that is too severe for similar State conduct.

First, think about what could be punished. This statute punishes any writing inserted by anyone. A child who takes off a few letters on the cereal box in a store to make it say something funny, that is covered by this act. Even a church bake sale that puts a flyer on a box of donuts and says, "Buy this package and donate it to our bake sale," they have put a writing on a consumer product and they have therefore violated the statute. This is a result of this effort to avoid the First amendment problem, which is really quite a difficult problem, but the path chosen by the sponsors criminalizes way too much conduct.

And finally, I think I will, I guess I will say two more things. The first is, I would agree with the remarks of Congressman Scott that the penalty here is too severe, and if the Committee is going to support this, I would strongly support the amendment to reduce it to a misdemeanor.

Finally, in conclusion, Chairman, I would note that we are criminalizing content-based speech, something that we should hesitate to do, no matter how offensive it is. Written speech is the highest form or most protected form of speech. We rarely have any statutes on the books that punish speech in this way. That is, there are no fighting words, there is no picketing or face-to-face confrontation, and there is no images or pornography that accompanies it. I am

not saying you can't do this. I am saying we should think twice before we start criminalizing speech.

Thank you very much, and I am obviously here to answer your questions.

[The prepared statement of Mr. Zlotnick follows:]

PREPARED STATEMENT OF DAVID M. ZLOTNICK

Good afternoon Chairman Smith and members of the Subcommittee. Thank you for affording me this opportunity to convey my concerns about the proposed bill. In short, I do not believe that using federal criminal legislation to address this issue is either warranted or wise. None of the evidence presented suggests the insertion of hate speech into consumer goods is a national problem of such scope and severity that it cannot be handled appropriately by the states, under either existing or new state statutes in the affected jurisdictions. In addition, the attempt to avoid a First Amendment challenge to this legislation has backfired and created a bill that is defective and dangerous to civil liberties. As I will show, the proposal has been written so broadly that it takes the unprecedented step of making speech which fails to present an immediate threat of violence and which does not contain other criminal content a federal felony. Moreover, the language of the bill sweeps too much unintended, less harmful conduct within its reach and prescribes too severe a penalty for such conduct. Without minimizing the undesirability of hate speech in consumer goods, the danger to civil liberties of this legislation is simply too great and I urge the Subcommittee reject this bill as drafted.

My first objection to this bill is fundamental. I do not agree that federal criminal legislation is either warranted or a wise method of addressing the problem of hate groups hijacking consumer goods to spread their message. Legal scholars across the political spectrum have pointed out that Congress continues to engage in the piecemeal federalization of crime, largely in response to media accounts of some outrageous or offensive incident. Moreover, these burgeoning offenses are created without any conclusive demonstration that the "problem" is both national in scope and cannot be adequately addressed by existing state codes or by new state legislation in the affected communities.

The best analysis of this issue can be found in the bipartisan report issued by the 1998 ABA Task Force on the Federalization of Crime, chaired by former Attorney General Edwin Meese. This report notes that "the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades." It goes on to conclude that "the Congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences. . . ."

Unfortunately, several aspects of this bill implicate the concerns raised by this Task Force's findings. For example, the Task Force noted that "[n]ew crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." 18 U.S.C. § 1365 was passed in 1983 to address the serious threat to human life and safety from product and labeling tampering—most likely the result of several well-publicized poisoning cases. The current bill would insert into what is essentially a public health and safety law, a new crime which criminalizes speech with no discernible impact on public health or safety. While both provisions concern consumer products, it is clear that no one has attempted to ascertain what role federal criminal law should play in relation to criminal conduct involving consumer products.

Moreover, while there have been isolated reports of hate speech tampering allegedly ignored by law enforcement, there are clearly existing state statutes which penalize such conduct. Every state makes the destruction, defacing, or altering of private property a criminal offense. Moreover, because courts are constitutionally permitted to consider a defendant's motive at sentencing, hate group members convicted of traditional property offenses for using consumer goods to spread their message can be punished more severely. To the extent that new legislation might be needed in a particular state, the bill's sponsor recognizes that, in fact, a number of affected states have already passed legislation similar to the instant bill.

While federal criminal legislation is sometimes appropriate, the Subcommittee should recognize that it can often be counter-productive because it creates "the illusion of greater crime control, while undermining an already over-burdened criminal justice system." ABA Report at 15 Even though citizens, and in this case, corporations, may be asking for federal criminal legislation, only 5% of prosecutions in this country are conducted by the federal government. Until it can be demonstrated that the states are incapable of adequately addressing this issue, Congress should hesi-

tate before creating yet another obscure federal crime that will overlap with existing or proposed state law. While many of the costs of federalization seem theoretical and remote in the face of examples of offensive conduct, such as a child finding hate speech in a cereal box, Congress must still balance the more amorphous but just as critical costs of new federal crimes to our federalist system of government, including the impact on state law enforcement and the concentration of power in the federal prosecutorial branch. *See* ABA Report at 50.

My second objection to the proposed statute deals with a serious drafting defect which expands the scope of criminalized conduct far beyond the harm intended to be remedied. This defect is apparently the result of the drafter's effort to avoid a First Amendment challenge to the legislation. Specifically, the stated goal of the legislation is to prevent hate groups from inserting their message into consumer products, and thereby offending the unwitting consumer who buys the product. However, under existing Supreme Court case law, Congress cannot constitutionally forbid specific categories of speech while exempting all others. The bill attempts to avoid this problem by criminalizing adding or inserting "any writing" to a consumer product. This First Amendment "fix," however, creates more difficulties than it solves.

First, the "any writing" language results in criminalizing conduct far beyond the harms contemplated by the sponsors because it prohibits any person, regardless of motivation, who uses consumer goods to transmit a message, however trivial or inoffensive. The bill therefore makes felons of individuals whose behavior might range from merely immature to even well-intended. For example, a consumer buys a large quantity of detergent from the local K-Mart. Later that day, this consumer visits Wal-Mart and finds out that this detergent is even cheaper there. Quite angry, the consumer writes "K-Mart Sucks" on the label of one of the K-Mart detergent bottles and returns the entire lot for a refund. When K-Mart unwittingly re-stocks the returned detergent in the store, the dissatisfied shopper is now felon under this bill. Other easily imagined examples exist. Take a group of high school student members of D.A.R.E. who visit a local "smoke shop" and place D.A.R.E. stickers on some of the merchandise. This well meaning prank would also violate the statute. The same would be true for any community group which placed their literature, no matter how neutral or inoffensive its content, in a consumer product. Thus, even placing flyers for a bake sale on donut boxes in a supermarket encouraging consumers to purchase the donuts and donate them to bake sale would violate the statute if the store did not give permission in advance.

Moreover, this is not a drafting problem that can be easily overcome because the true purpose of the bill, to punish hate speech only, is on a collision course with the First Amendment. This problem can also be understood in the context of a basic issue in criminal law known as *mens rea* or criminal intent. With rare and controversial exceptions, criminal liability requires a forbidden act and a specified mental state to accompany that act. Here, the real intent the drafters seek to punish is the intent to transmit offensive hate speech to consumers. Because the First Amendment forbids such a content-based *mens rea*, the statute employs a much broader, less onerous intent—requiring only that the person "knowingly" insert or add the writing. As bemoaned by Paul Craig Roberts in his recent book, *THE TYRANNY OF GOOD INTENTIONS*, the erosion of strict intent requirements and the proliferation of offenses make it possible to "prosecute potentially every person in the community" as "prosecutors have invented new felonies to fit those who have been targeted."

This bill is a telling example of this danger. The most analogous state crime is destruction or defacing of private property. The *mens rea* for this offense is simply the intent to destroy or alter the property. Because hate speech is not an issue, there is no requirement that the person intend their act to have some specific impact on the owner and there is no premeditation or other aggravating quality required. In relative terms, the intent to destroy or alter a consumer good is at the low end of morally blameworthy conduct. In the absence of a high value on the property destroyed, the ordinary penalty for such an intent and act therefore is usually a petty misdemeanor.

In this bill's backdoor effort to penalize certain types constitutionally protected speech, it takes this ordinarily trivial *mens rea* and act and elevates their punishment to a felony. This is a mistake. Minor criminal intent and minor criminal acts should be punished as such. Congress should not elevate this kind of offense to felony status to punish indirectly, an intent or motive that cannot be punished directly. It is also dangerous. As shown above, the bill, as currently drafted, easily encompasses a broad range of unintended conduct. More disturbing, however, is that this bill also takes the unprecedented step of criminalizing speech unaccompanied by either harmful images, an immediate threat of violence or public disruption, or content that is otherwise criminal in nature. Therefore, this new crime

would be quite different from all other existing offenses that punish speech. For example, child pornography offenses require both speech and images. Other speech related offenses, such as fraud or solicitation, involve speech whose content is, in and of itself, criminal in nature. Disorderly conduct offenses protect against an immediate threat to public safety. Here to the contrary, this bill may well be the first federal felony that criminalizes speech alone solely based on its method of transmission. Thus, in an effort to avoid creating a First Amendment challenge, this bill creates even greater dangers by elevating a petty criminal intent to felony status and by criminalizing speech in a manner not heretofore found in the federal criminal code.

While we might hope that federal prosecutors would choose not to charge any of the examples mentioned above, Congress should not create opportunities for federal law enforcement to selectively create felony records for individuals based solely on a political message that contains no fraud, misrepresentation, solicitation, or an immediate danger to public safety. One need only substitute the abortion debate, animal rights, or some other current controversial issue with dedicated and zealous advocates, to make the specter of selective, message-based criminal prosecution less fanciful.

Having offered this critique, I have three graduated suggestions for the proposed legislation. Consistent with my primary federalism point, the best result would be that this bill not be reported out of the Subcommittee. Looking at the broader problem of hate groups and hate speech, in actuality, most observers would agree that the greatest victories have not been the result of federal criminal prosecutions. In fact, many hate groups portray the federal government as the enemy and federal prosecution simply reinforces this belief among their members and sympathizers. Much greater success has been achieved by mobilizing local community leaders such as elected officials, religious leaders, and members of the business community, in response to specific incidents. This kind of local action robs hate groups of legitimacy and creates wonderful opportunities for education and alliances within the affected communities. Certainly, one part of this effort should be to educate and encourage local prosecutors to use existing laws to prosecute this conduct, or to seek state legislation if necessary. Certainly, the companies whose products have been used to transmit hate speech can use their resources to fund and promote the kind of local action that is most effective in dealing with hate speech.

If the Subcommittee believes federal criminal legislation is necessary, we would strongly support amending the bill to make this offense a misdemeanor. This change would make the mens rea of this new crime written consistent with the punishment for state laws that punish a similar criminal intent. Such a change would also protect against creating felons of those who might knowingly and perhaps stupidly violate this law but without the motive or intent contemplated by the sponsor.

Lastly, the Subcommittee should consider adding language that defines the intent requirement to better capture the conduct it seeks to punish while still avoiding constitutional infirmity. For example, the bill could be amended to require that the defendant “knowingly stamp, print, place, or insert any writing in or on any consumer product . . . with the intent to arouse fear, hate, anger, or alarm in others.” This language should survive First Amendment scrutiny, and it more narrowly addresses the intent of the bill’s sponsor.

Mr. SMITH. Thank you, Professor Zlotnick. I will recognize myself for questions, and let me just address a couple comments to you first and then get to questions, as well.

First of all in regard to the benign or inoffensive speech that you referred to, I don’t think there is any prosecutor or anybody else who is going to try to subject someone to penalty or punishment or jail because of that.

The second is, you said that we may be looking at a pebble, not an avalanche yet. I think there are lots of pebbles out there, but besides that, I think one of the purposes, if we do our job right here in the Federal Government, is to prevent problems from growing and not wait until they are so large that we are basically reacting to the problem. So here you are talking about measures I think that will prevent worse things from happening, which is a legitimate and even rare thing for Congress to do sometimes.

And lastly, on the leaving it up to the States, it is my opinion that if you left it up to the States, you would have a mishmash or a patchwork quilt, perhaps, of different laws. And I would agree with you, except for the fact that interstate commerce is involved, and as you know, as the Constitution is interpreted, that is almost an open invitation for Congress and the Federal Government to get involved. Because of that interstate commerce, I think that that easily justifies our intercession on the issue.

I was going to ask you, though, you mentioned hate speech and so forth. I gather, then, you are opposed to any kind of federalizing of hate crimes, as well?

Mr. ZLOTNICK. I don't think I would say I am opposed to any federalizing of it. I think I am trying to raise for the Committee the questions that should be asked and try to answer them for this bill. I don't believe as a blanket rule that there are not.

There are in fact and there can be some hate crimes that are so national in scope, or beyond the ability of law enforcement to deal with, that it might be something to address. I would be happy to share those with you, perhaps at another time, but I am trying to address this bill.

Mr. SMITH. All right. You have really answered my question on that, and I appreciate that.

Ms. Weaver, let me go to you, and we appreciate your testimony. As I recall, your son was 10 years old when you opened the cereal box?

Ms. WEAVER. Yes.

Mr. SMITH. And was offended by that. Do you think that if Congress were to pass a bill, that would discourage individuals from inserting this kind of offensive material into the boxes or containers?

Ms. WEAVER. Yes, I do.

Mr. SMITH. And that would be good for mothers and children, and fathers as well, I presume.

Ms. WEAVER. Yes.

Mr. SMITH. In regard to your own family, you know, this wasn't the worst thing that could happen. On the other hand, if it is preventable, it is worth preventing. And so how have you explained this to your son, as far as it is not going to happen again or it shouldn't happen again, or "I am going to try to do something about it?"

Ms. WEAVER. We have addressed it as it was something that was not controllable by us, and it is not something that we could prevent in the future. And hopefully this law would assist in items that are placed and make it a punishable crime.

Mr. SMITH. Well, hopefully the day will come when you can tell him, "You ain't going to see that anymore, and it is because of my efforts, at least in part." So we appreciate your being here.

Mr. MacLeod, I wanted to ask you a couple of questions. Is it your opinion that allowing this kind of activity to go on without any sanction attached would lead to a diminution of consumer confidence because of the threat, or because of the actual experience of consumers?

Mr. MACLEOD. I don't think there is any question about that, Mr. Chairman. I think when a consumer finds that a product that is

supposed to contain well-trusted, familiar, sanitary products, such as the food products that we buy on our grocery shelves, that that trust has been violated, that trust has been diminished, and it is a very difficult thing to regain.

Mr. SMITH. And what about the incidents that go unreported? Are they very numerous, in your judgment, and has there been any kind of a trend recently? Is it escalating or diminishing, or has it plateaued, or how do you see the problem?

Mr. MACLEOD. We are hearing more about it now, and I can tell you from my experience at the Federal Trade Commission that the complaints that come to the attention of the companies or of the law enforcement agencies are always a very small tip of the iceberg. Most of the experiences like that which the Weaver family suffered are experiences that we never hear about.

Mr. SMITH. Few people are going to make the efforts of the Weaver family, and call and complain or talk to local law enforcement officials or whatever. I don't know what it would be, 1 out of 100 or 1 out of 50, but it is just as you say, the tip of the iceberg, I think.

Mr. MACLEOD. It is very small, far less than 10 percent. I think 1 out of 50 is not a bad guess.

Mr. SMITH. Okay. Thank you very much. You all have answered my questions, and the gentleman from Virginia, Mr. Scott, is recognized for his.

Mr. SCOTT. Thank you, Mr. Chairman, and I want to thank all of the witnesses for their testimony.

Professor Zlotnick, you indicated the question of whether this is haphazard or part of an overall plan. I think most of us think that this should have been covered in the Anti-Tampering act. When you are talking about the product, if you get inside, put something inside the product, as in Ms. Weaver's case, I think I would have done the same thing. I wouldn't have trusted the product itself. And therefore I think we ought to make sure that this is illegal.

How would you prosecute? Could you go a little more into detail about what kind of State law might cover it now? Just the destruction of public property would be enough, just by inserting some material without destroying the box at all, just inserting, as Mr. MacLeod did, without destroying anything?

Mr. ZLOTNICK. Most—most, not all—most State statutes deal with not destruction of property but also altering or defacing private property, simply to protect commercial merchandise. To the extent that those statutes don't exist, they can be passed or they can be interpreted to cover this. My belief is, most States are already covering this type of act, and local prosecutors would bring them if they were asked to do so.

Mr. SCOTT. Does the fact that this involves interstate commerce, where the inserts may take place in one State and end up in another State, does that speak to the need of Federal legislation?

Mr. ZLOTNICK. Well, I think it speaks to whether this statute would pass constitutional muster under Lopez. I think it probably would.

I think the question that Congressman Coble raised is, is this a local law enforcement problem or national? These groups tend to be either small local groups or individuals, you know, probably some-

what disturbed local individuals. I don't think we have heard that there are groups going from State to State or breaking into warehouses and putting these messages into boxes. This is a very local type of crime that I think is, at least for now, best addressed by local law enforcement rather than Federal. That would, I think, be the most rational way of addressing the problem at this point.

Mr. SCOTT. Mr. MacLeod, the Senate version has a provision that the material has to be in the product, not just on the product. The House version says in or on. Where you could put a little sticker or something like that on the material, that would be covered in the House version, apparently not in the Senate version. Do you have any view on whether we should cover messages on the product as well as in the product?

Mr. MACLEOD. We have seen messages as disturbing affixed to the outside of the product. And it is the kind of thing you might not notice when you are picking up the product at the store because it is already a generally familiar package, and then you come home and then you discover or perhaps your child discovers that something has been changed on the label. Indeed, the example I gave, "made from human sources," was an example that was on the side of a product.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott.

The gentleman from Wisconsin, Mr. Green, is recognized for his questions.

Mr. GREEN. Thank you, Mr. Chairman.

Professor Zlotnick, something that you said that struck a chord with me is that the way this legislation is drafted, there is no requirement of intent to offend or to embarrass or to humiliate, and that broadness does concern me a little bit. And the example you raised, I agree with the Chair, I think it is unlikely that a prosecutor would take that up, but on the other hand, you know, I think we should look at specificity here.

Do you have any suggestions as to how we could narrow this in a way that would deal specifically with the problem that one of our witnesses has raised?

Mr. ZLOTNICK. Yes, I do. In my written testimony I suggest language that paraphrases language from the fighting words Supreme Court case, which would add "with the intent to arouse fear, hate, anger or alarm in others." That would therefore punish the intent of the person placing or altering the product, and therefore perhaps eliminate those individuals, for example, the group—one example I used are the kids from DARE who go to a smoke shop and put stickers on products, trying to send a positive message to people who might be buying it that this might be harmful to you. They are now not prosecutable, whereas only people who are intending to arouse this type of hate feeling or anger in the recipient would be the ones who would be punished. I think that would certainly lessen my objections to the bill as drafted.

Mr. SMITH. Would the gentleman from Wisconsin yield just for a second. I want to agree with the professor as far as the importance of motive, but intent itself is awfully difficult to prove in many instances, and oftentimes that gives you an automatic de-

fense that is hard to overcome, and that might be a consideration, as well.

Mr. SCOTT. Would the gentleman yield again?

Mr. GREEN. Yes, I would yield.

Mr. SCOTT. This, we are getting into First amendment problems. I am not sure that we would want to restrict it just to those who are intending to offend. Getting a message out might not offend people, but you have no right to use someone else's product to get your even unoffensive message out, and I think it in fact ought to be covered.

I thank you for yielding.

Mr. GREEN. Reclaiming my time, and I am thinking out loud with this, because I think we all recognize, at least I certainly recognize the importance of dealing with the situation that the witnesses raised. But I think we all know of situations, especially quite frankly during campaign time, in which people have taken normal products and put stickers on them and passed them out.

Mr. SMITH. That is offensive.

Mr. DELAHUNT. That solves that question right there.

Mr. GREEN. Offensive to some. But that is the concern that I have. And I am certainly not going to take action to try to block this legislation from moving forward, but I guess I would ask that all of us, as this legislation moves forward, think real carefully about its breadth, because I think it may be broader than we really need or intend to cover the situation.

I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Green.

The gentleman from Massachusetts is recognized for his questions.

Mr. DELAHUNT. I thank the Chair, and I concur with the concerns expressed by my colleague from Wisconsin. And I would recommend to the Chair and to the Ranking Member that at the end of the markup, if this legislation should pass, and I do intend to support it, that we do address these concerns, because I think the professor makes a very valid point.

Mr. MacLeod, we can guess and we can speculate, but that always disturbs me, because we do make public policy here too often based upon guesses, estimates, and speculation. But what kind of data is available to measure the dimensions of the problem? How many incidents have been reported, for example, to your trade association?

Mr. MACLEOD. The trade association does not itself collect this data right now.

Mr. DELAHUNT. Who does?

Mr. MACLEOD. We do know one company, for example, Kraft, has nearly 100 examples from just the last few years, and Kraft—

Mr. DELAHUNT. So, because I don't have a lot of time, so we have about 100 examples from obviously a major distributor. Well, again, I don't know whether that could be described as a problem of great magnitude, but at least there is some data that is available, according to your testimony.

If you are aware, how many lawsuits have been filed against manufacturers, distributors, you know, by litigants who have been

the victims of these kind of writings, the kind of material that Ms. Weaver testified to?

Mr. MACLEOD. I am not aware, but I would certainly be glad to take a look and return with the information for you.

Mr. DELAHUNT. I would appreciate that.

You know, I also do share with the professor, as do many across the entire spectrum, from left to right—in fact, I think it was the former Attorney General, Mr. Meese, who came out with a report expressing concern about the federalization of crime.

But professor, in this case, this really goes to a particular problem at the national level in terms of interstate commerce. So while I concur with the concern you expressed, I think in this case it goes past just simply a local issue, because this goes to the heart, if you will, of interstate commerce. And I would just make that observation.

Let me say this about the penalty issue. Whether it is a year, whether it is 3 years, is totally irrelevant. If this is not organized activity, if this is not planned—and it doesn't seem to be, it seems to be, from what your testimony is, rather haphazard—the answer lies in the enforcement, not in whether a statute carries a particular penalty, albeit whether it be a misdemeanor or a felony. You know, those that perpetrate these kind of crimes, Ms. Weaver, in my judgment do not carry with them a copy of the criminal code, whether it be the State criminal code or whether it be the Federal criminal code, but the issue is compliance.

And the Chair and the Ranking Member might want to consider a provision that would mandate or suggest or recommend that the Attorney General assign some personnel to deal with this particular effort, to ensure compliance, to ensure enforcement. Otherwise, I dare say that we won't see any change, because the sanction itself in my judgment will not serve as a deterrence. No one is listening to the message that we are sending out there.

And I yield back.

Mr. SMITH. Thank you, Mr. Delahunt.

Before we go to the gentleman from North Carolina, I just want to encourage the Members to return immediately after the next vote or votes, because we don't expect the markup to take more than about 5 minutes, but we would like to complete it today. And certainly I appreciate your presence for the hearing, as well.

Mr. SCOTT. Would the gentleman yield?

Mr. SMITH. Yes.

Mr. SCOTT. If the questions go real quickly, we might be able to do the markup before we—

Mr. SMITH. Okay, but let me recognize the gentleman from North Carolina for his question or questions.

Mr. COBLE. Thank you, Mr. Chairman.

Ms. Weaver, a geographic question. Where is Leavenworth?

Ms. WEAVER. Leavenworth is at the foot of the Cascades.

Mr. COBLE. I know the State well, and I don't know Leavenworth.

You mentioned that you contacted the Kraft consumer group. Did they cooperate with you? Did they in fact come and reclaim the package?

Ms. WEAVER. Yes.

Mr. COBLE. Do you know if they did anything subsequent to that? Any further investigation conducted by them, as far as you know?

Ms. WEAVER. I don't know.

Mr. COBLE. And I was distressed that the retail outlet did not want to become involved. I think they could have helped you, perhaps. In any event, it is too late to worry about that.

Are you all aware of any cases that have been prosecuted under current State destruction, altering, or defacing laws? I guess professor, or Mr. MacLeod?

Mr. ZLOTNICK. I have not had an opportunity to look into that, but I would be happy to.

Mr. COBLE. I would like to know that, just as a matter of interest.

Mr. MACLEOD. Yes.

Mr. COBLE. All right. Thank you all for being with us. I appreciate you being here.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Coble.

Mr. Schiff and Mr. Keller, would you like for us to proceed with the markup or would you like to go to your questions?

Mr. SCHIFF. I would be more than happy to waive questions.

Mr. SMITH. Okay. Is that all right with you, Mr. Keller?

Mr. KELLER. I had some questions, but I will waive them.

Mr. SMITH. In the interest of comity and good legislative effort, thank you for holding off on those.

[Whereupon, at 2:58 p.m., the Subcommittee proceeded to other business.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

The Journal News, Rockland Edition, Friday, April 23, 1999, 1A

Message found in cereal box

Chestnut Ridge boy discovers anti-abortion flier in unsealed carton

LAURA FASSACH
The Journal News

CHESTNUT RIDGE — The big blue box with small rings of chocolate splashing into a bowl of milk caught the eye of 8-year old Mario Alexandre Jr. a few weeks ago at ShopRite in Pearl River.

The next day at the family's breakfast table in Chestnut Ridge, the child opened the unsealed carton of Orso O's to find something other than the crunchy cereal.

Mario Alexandre Sr. said his son found an anti-abortion flier



Chitra Cohen/The Journal News
Mario Alexandre Jr., 8, of Chestnut Ridge displays the box of cereal in which he found an anti-abortion flier.

with bold black letters tucked inside the box.

Underneath the words "Natural Born Killers" was a message that said groups such as "Planned Parenthood, the National Organization For

Women and The American Civil Liberties Union are responsible for the killing of millions of babies each year by abortion ..."

The flier included a crucifix
Please see CEREAL, 2A

The Journal News, Rockland Edition, Friday, April 23, 1999, 1A

8-year-old boy finds anti-abortion flier in sealed container of cereal

CEREAL from 1A

above 800 telephone numbers for two anti-abortion organizations, including Birthright, an international anti-abortion pregnancy services agency with a regional office in Nanuet.

"He shouldn't have been subjected to that," Alexandre said yesterday. "It was inappropriate."

No one has offered an answer on how the flier made its way into a children's cereal box.

Terry Weaver, director of Birthright's national headquarters in Atlanta, said the literature was not created or distributed by the not-for-profit organization. But within the past two years, Weaver said, she has received at least four similar complaints — all from Maywood, N.J., about 15 miles from Pearl River — of fliers found in food packages purchased at an A&P.

Tony Wong, the store manager at the A&P in nearby Saddlebrook, said yesterday that he had not heard of any incidents.

Weaver said the flier found in Rockland was the first she had heard of in New York.

"I don't know if it's someone trying to help us or someone trying to make us look bad," Weaver said.

She described her group as an independent organization that was not tied to political anti-abortion groups. Weaver said the group, which has about 400 offices throughout the country and in Canada, is "low-key."

Weaver said she had two 8-year-old grandchildren and wouldn't want them to pull that material out of a cereal box.

"If I were the mother I would have called the number and raised holy hallelujah," she said.

A store manager at ShopRite in Pearl River who refused to give his name would not comment beyond saying that he had heard no complaints. At the Middletown Road store yesterday afternoon, several boxes of Orzo O's lined the shelves along with other cereals.

A spokesman from Kraft Foods, which manufactures Post Orzo O's, said the company would look into how the flier wound up in the cereal box.

Though the Alexandres are Roman Catholic and Mario Jr. attends parochial school at St. Catherine's in Blauvelt, the parents were alarmed by the graphic nature of the literature and said their son was too young to see it.

Michele Alexandre called Post on April 11, two days after she bought the cereal. Five days later she hadn't received a response and mailed a complaint letter to the chief executive officer of Kraft Foods.

Michael Mudd, a spokesman for Kraft Foods, said the company had not received Alexandre's letter but the consumer affairs department was handling her original telephone complaint.

"We very much regret the situa-

"If I were the mother I would

have called the number

and raised holy

hallelujah."

- Terry Weaver,

director of Birthright's national

headquarters in Atlanta

tion," Mudd said. "At this point we have no way of knowing how the flier got into the package."

Meanwhile, the Alexandres have had to answer Mario Jr.'s questions about abortion and unborn babies.

"He's very good at reading," Mario Alexandre Sr. said. "Whatever he sees in front of him he's going to read."